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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 874

NELSON H. LEO, doing business as OVERSEAS ASSOCIATED CORPORATION,

Respondent,

—against—

INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania Corporation,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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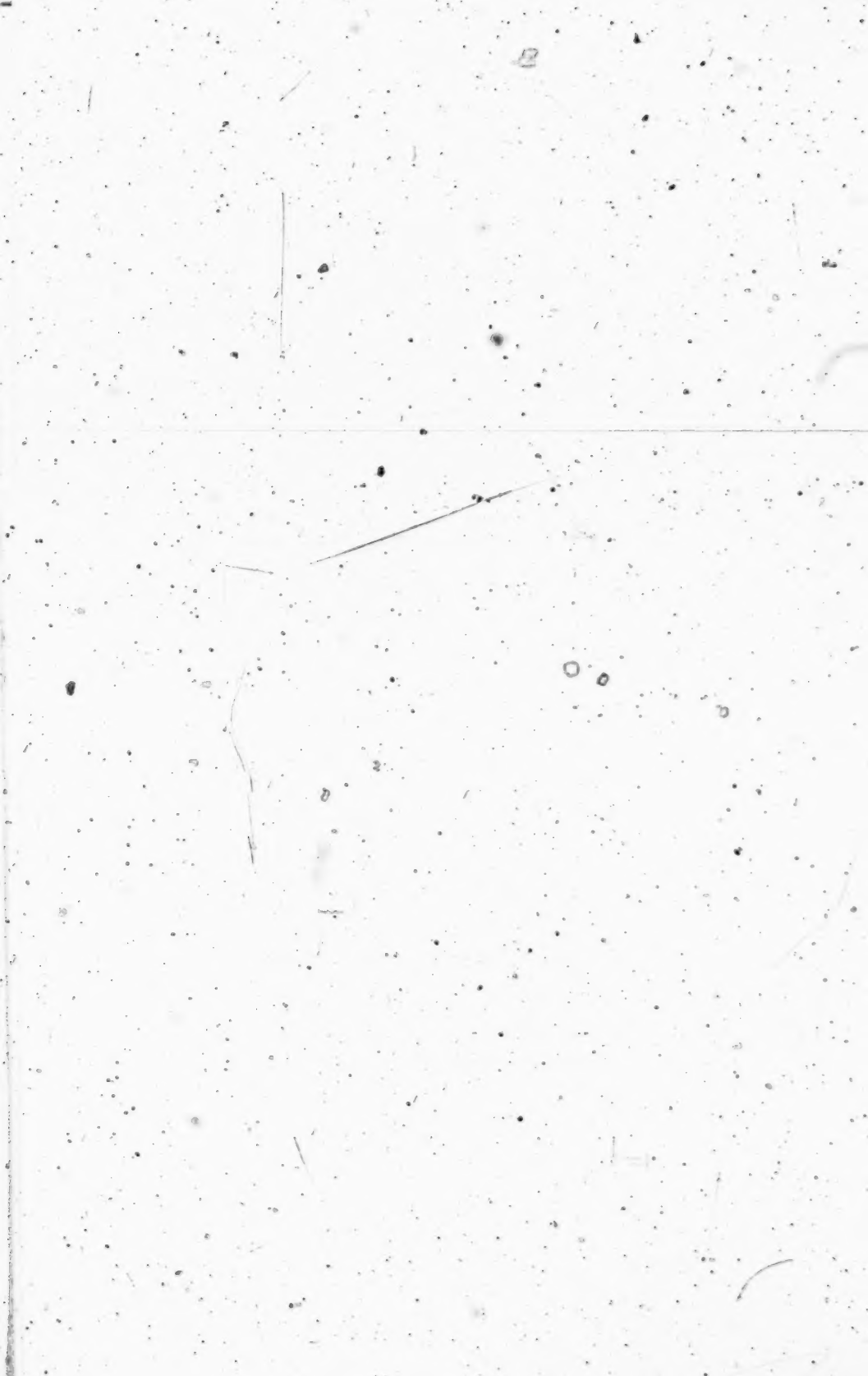

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

The Opinion Below

The opinion of the Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Southern District of New York; entered upon a jury verdict, has not as yet been officially reported. It and the judgment of affirmance are printed as an Appendix to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on March 8, 1960. A stay of the issuance of mandate pending the filing of this petition was granted by the Court of Appeals on March 28, 1960, subject to the conditions of Rule 28(c) of that Court. The jurisdiction of this Court is invoked under 28 U. S. Code, Sec. 1254(1).

Questions of Law Presented

1. Whether defendant was deprived of an impartial trial by statements of the Trial Judge in the presence of the jury, during a trial on issues formulated by the self-same Judge, that (a) if the plaintiff's attorney understood the real defense in the case he was ahead of the Trial Judge, and (b) the basic position of the defendant was that it did not want to pay the money?

2. Whether it was error for the Court of Appeals to affirm a judgment of the District Court for plaintiff, when there was no showing that the improper remarks in the presence of the jury "did not and could not have prejudiced the rights" of the defendant?

3. Whether, in an action on a marine cargo policy valued at $300,000, it was error for the Trial Judge to charge the jury that any verdict for the plaintiff "will automatically be a verdict for $300,000", when one of the trial issues formulated by the self-same Judge, was whether all of the cargo which defendant agreed to insure was on board the barge when it sank, and after much evidence had been received

from which the jury could have found that much less than all of such cargo was on board?

4. Whether it was error for the Trial Judge to refuse to charge the jury that if only a part of the goods which defendant agreed to insure was shipped then any verdict for the plaintiff must be for a pro rata part of the insured value?

Statement of the Case

A broker representing a client in Manila wrote to the Manila agent of petitioner asking for insurance on "a large amount of spare parts and equipment" to be shipped from Manila to Davao on a barge. In his letter the broker represented the proposed shipment to be "of high value" with an approximate tonnage of between 300 and 350 tons (Ex. W, 155a).* A few days later the broker again wrote to petitioner's agent that "The amount of insurance coverage is $300,000 premiums payable in dollars from the New York office of Mr. Appel" (Ex. Y, 156a). In the same letter the broker stated that the value of the shipment was estimated at $1,000 per ton (Ex. Y, 157a). Hence, a valuation of $300,000 (300 tons at $1,000 per ton) was arrived at. While the cargo was being loaded three months later, the broker knew that the shipment should consist of 300 tons (102a). He received this information from the assured (102a).

The barge, concededly carrying no more than 120 tons, sank one day out from Manila.

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* Figures followed by "a" refer to pages of appellant's appendix, Volume I of certified record.

Figures followed by "A" refer to pages of appellee's appendix, Volume II of certified record.

Figures preceded by "App." refer to appendix to this petition.

After the insurance claim was made, the assured assigned his interest in the policy to an Indonesian living in Hongkong who claimed to have originally sold the United States surplus goods in question to the assured. He is the plaintiff-respondent in this action.

Four days before the trial commenced, the trial Judge held a pre-trial conference and, in a formal order, stated the issues to be tried. The first two of the four issues thus formulated read as follows:

"1. Is the plaintiff entitled to recover the sum of $300,000, plus interest, as insurance, or, if not, how much, if anything is plaintiff entitled to recover?

"2. Is the plaintiff prevented from recovery in this action by virtue of a misrepresentation as to the weight or value of the cargo to be shipped?" (Record on Appeal, p. 5507 at p. 5509)

During the trial defendant offered extensive proof to demonstrate that all of the cargo which defendant had agreed to insure, could not have been on board the barge and therefore was never at risk.

The barge master, a witness for the plaintiff, testified that only about 100 tons (one-third that represented to defendant) were loaded on the barge (29a). An expert witness for defendant testified that based upon the known displacement of the barge no more than 80 tons of cargo could have been on board (107a).

According to the testimony of plaintiff's own witness, the insured shipment was calculated to occupy approximately 50,000 cubic feet (107a, 108a), which,

when loaded on the barge, would have resulted in cargo tiered to a height of 16 feet (108a), whereas in fact the cargo was piled to less than one-third of that height—5 feet (77a).

In addition, defendant offered proof that many sizable individual items allegedly included in the cargo shipped, could not have been on the barge, because in the words of the surveyor, they were "too big to be in that LCT (the barge) and I never saw anything like that on board the LCT 732" (80a).

The Trial Judge refused to charge the jury that if it should find that only part of the expected cargo had been put at risk, the verdict should be based upon a pro rata share of the total valuation set forth in the policy of insurance (150a). He erroneously charged the jury that if its verdict should be for the plaintiff it "will automatically be a verdict for $300,000" (146a).

The Court of Appeals upheld the Trial Judge's position in the following words,

> "The court's charge was correct. The policy was a valued policy for $300,000. It was issued to cover the goods which Appel had in a warehouse in Manila. There was no evidence that less than all of the goods covered by the insurance were shipped. The tonnage of the goods was misstated, and that posed the question of materiality which we have discussed above. Once the jury had resolved that question, if there was a question to be resolved, it had to either find for the defendant on the ground of material misrepresentation, or find for the plaintiff for the amount

of the policy. To have authorized the jury to find for the plaintiff, but for a lesser amount, would have been to authorize them to bring in a compromise verdict not justified by the evidence" (App. 6).

The above quoted statement that the policy "was issued to cover the goods which Appel had in a warehouse in Manila" (App. 6) is not correct. The policy contains no such provision. It referred only to "Irrigation and road building mach'y and equipment and spare parts" (Ex. 6, 567A). Nor does either of the two letters written by the broker to the agent prior to the issuance of the policy contain any such provision (Ex. W, 155a, Ex. Y, 156a). As noted above, and contrary to the statement of the Court of Appeals, there was substantial evidence that much less than all the insured goods was shipped.

The Court of Appeals apparently concluded that the jury, having determined the issue of the materiality of the proven misrepresentation (of the weight of the insured goods at the time the policy was issued), could not, thereafter, consider whether all the cargo insured was actually shipped or permit such an issue to affect their verdict.

There is absolutely no connection between (a) the issue of materiality of misrepresentations made prior to issuance of the marine policy, and, (b) the separate and distinct question, whether all the insured cargo was put at risk three months later. The Trial Judge, when he formulated the issues in the pretrial order, noted the distinction and separately formulated each issue (Record on Appeal p. 5507 at p. 5509). His

error lay in not recognizing that distinction in his charge to the jury.

Late in the trial, the plaintiff recalled the assured as a rebuttal witness and, during an argument on the propriety of a question, the plaintiff's attorney stated in the presence of the jury that "for the first time I understood what the real defense in this case was" (122a).

The Trial Judge immediately interjected,

> "If you understand it you are ahead of me" (122a).

After denying a motion for a mistrial (124a), the Trial Judge said to the defense counsel, in the presence of the jury,

> "All right, then whatever defense do you have" (125a).

Defense counsel started to reply to the Trial Judge's question, as follows:

> "The basic position we have * * *" (125a).

At that point, in the middle of the defense counsel's answer to the Judge's question, the Judge interrupted and stated,

> "Is that you do not want to pay the money. That is your basic position here, isn't it?" (125a).

The defense counsel again objected (125a).

This issue, whether a defendant, even if it be an insurance company, is entitled to a fair and impartial

trial to a jury, was squarely presented to the Court of Appeals. That Court disposed of the question by substituting sweet phrases for the raw language of the record, saying:

> "During the trial of the case, the Judge said, in the presence of the jury, that he did not yet understand what the defendant's defense was, and asked counsel if it was only that they did not want to pay the money" (App. 7).

Having thus emasculated the record, the Court of Appeals further excused the first comment of the Trial Judge by stating that, "It was high time that the issues be defined for the Judge and the jury, and it was proper for the Judge to insist that they be defined" (App. 7). The issues had been defined by the very same Judge in the pre-trial order (Record on Appeal p. 5507 af p. 5509). In fact, the Trial Judge was quite aware of the issues. On the following day, out of the presence of the jury, he denied the plaintiff's motion for a directed verdict (132a) and plaintiff's motions to dismiss the first and second affirmative defenses (128a, 129a, 130a).

The prejudicial interruption by the Trial Judge of an answer to his own question, to put in counsel's mouth the statement that the only defense was a desire not to pay, is disposed of by the Court of Appeals in the following language:

> "His casual, and obviously humorous, remark about not wanting to pay the money might better have been left unsaid, but we have no idea that it made an impression on the jury which affected the outcome of the case" (App. 7).

There is nothing in the trial record to support the Court of Appeals' gratuitous statement that the remark was "casual and obviously humorous".* A mere reading of the language demonstrates the opposite.

Defense counsel's immediate reaction to the Trial Judge's remark demonstrates the absence of casualness or humor—

> "I have to again object to these remarks, much as I regret that I have to do it, your Honor." (125a)

It is submitted that the Court of Appeals also erred in denying the defendant a new trial because it had "no idea that it (the Trial Judge's remark) made an impression on the jury which affected the outcome of the case" (App. 7). The remark which the Court of Appeals itself conceded "might better have been left unsaid," was improper and erroneous and it cannot be disregarded unless it should affirmatively appear from the record of the trial that it did not, and could not, have prejudiced the defendant's right to a fair trial.

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* If the respondent claims that there is a single reference in the trial record to indicate that the judicial remark was "casual" or "obviously humorous" he owes it to this Court to identify any such reference in his answer to this petition.

REASONS FOR GRANTING THE WRIT

I

The position taken by the Court of Appeals for the Second Circuit in upholding the Trial Judge's prejudicial comments before the jury is in direct conflict with the basic principles enunciated by the Courts of Appeals for the Fourth and Seventh Circuits and by this Court.

When the Court of Appeals for the Second Circuit refused to grant the petitioner a new trial on the issue of the Trial Judge's unfair and prejudicial comment in the presence of the jury—that defendant's basic position was that it did not want to pay the money—it took a position directly in conflict with the decision of the Court of Appeals for the 7th Circuit in *United States* v. *Scott*, 257 F. 2d 344, 377 where that Court stated:

> "The influence of the trial judge on the jury is necessarily and properly of great weight, Starr v. United States, 1894, 153 U. S. 614, 626, and he should not say anything which might have the effect of prejudicing the cause of either party before those whose duty it is to decide on the facts. United States v. Levi, 7 Cir. 1949, 177 F. 2d 833. It is the duty of the trial judge to endeavor to maintain throughout the trial an atmosphere of impartiality. United States v. Wheeler, 7 Cir. 1955, 219 F. 2d 773."

The Court of Appeals for the 7th Circuit adhered to that position in *U. S.* v. *Carmel*, 267 F. 2d 345, 350.

It is accepted law that the basic principles of fairness and impartiality are the same in civil and criminal cases. In *Crow* v. *DeManno*, 225 F. 2d 652, 655, the Court of Appeals for the First Circuit said:

> "The cases cited above (Quercia v. United States, 289 U. S. 466, and United States v. Brandt, 196 F.2 653) are both criminal. We have no doubt, however, that the principles enunciated in them apply as well to civil cases. No trial in court is ever a purely private controversy in which the public has no interest. 'The State, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence'. N. Y. Cent. R.R. Co. v. Johnson, 1929, 279 U. S. 310, 318."

Petitioner submits that even an insurance company is entitled to fair treatment, and to the application of the principles so eloquently stated for this Court, and all other courts, by Chief Justice Hughes in *Quercia* v. *United States*, 289 U. S. 466, 470:

> "The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling'. This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided'."

The decision of the Court of Appeals in the instant case is also directly in conflict with the decision of the

Court of Appeals for the Fourth Circuit in *Virginian Ry. Co.* v. *Armentrout*, 166 F. 2d 400, 405 where Judge Parker said:

> "The judge occupies a position of great influence with the jury in conducting a trial; and while he should not hesitate to exercise the power of comment to clear away false issues and lead the jury into a proper understanding of the facts, he should be careful not to assume the role of counsel or to say anything which might have the effect of prejudicing the cause of either party before those whose duty it is to decide on the facts."

If this had been a criminal trial and the trial judge had interrupted defense counsel, to state that the defendant's basic position was that he did not want to go to jail, it would have been obvious to all that the defendant did not have a fair trial. Petitioner respectfully submits, that it is no less erroneous in a civil trial for the trial judge to tell defense counsel, in the presence of the jury, that defendant's basic position is that it does not want to pay the money.

The approval of such conduct is not only contrary to the holdings of the Courts of Appeals in other circuits but it is also contrary to the admonition given by this Court in *Quercia* v. *United States*, 289 U. S. 466, 470 that an expression of judicial opinion "should be so given as not to mislead, and especially that it should not be one-sided".

It would be difficult to conjure up a more one-sided expression of judicial opinion before a jury than the

comment that the basic defense an insurance company defendant had was a desire not to pay the money.

The decision of the Court of Appeals for the Second Circuit establishes a new, and low, standard for the conduct of jury trials, far from the standards of fairness required by this Court.

II

The Court of Appeals for the Second Circuit is satisfied with the absence of affirmative evidence that improper remarks by a Trial Judge influenced the jury. It thus takes a position directly opposed to that repeatedly announced by this Court and by the Courts of Appeals in the Fourth and Fifth Circuits.

The Court of Appeals in the case at bar refused to order a new trial since, it said, it had no idea that the Trial Judge's comment (that the defendant's only defense was a desire not to pay the money) made an impression on the jury which affected the outcome of the case (App. 7). That statement of law is directly contrary to prior rulings of this Court and of the Courts of Appeals for other Circuits.

This Court said in *Vicksburg & Meridian R.R.* v. *O'Brien*, 119 U. S. 99, 103:

> "While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears, beyond doubt, that the

error complained of did not and could not have prejudiced the rights of the party. Smiths v. Shoemaker, 17 Wall. 630, 639; Deery v. Croy, 5 Wall. 795; Moores v. Nat. Bank, 104 U. S. 625, 630; Gilman v. Higby, 110 U. S. 47, 50."

Again, in *McCandless* v. *United States*, 298 U. S. 342, 347, this Court held that a judicial error relating to "substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial. *United States* v. *River Rouge Co.*, 269 U. S. 411, 421; *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 82; *Williams* v. *Great Southern Lumber Co.*, 277 U. S. 19, 26." (Emphasis is that of the Court.)

In *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 82, this Court held that in jury trials erroneous rulings are presumptively injurious and "furnish ground for reversal unless it affirmatively appears that they were harmless."

In *Quercia* v. *United States*, 289 U. S. 466, 470, this Court said that, "The influence of the trial judge on the jury is necessarily of great weight and his lightest word or intimation is received with deference, and may prove controlling."

This Court has consistently held that a reversal will be ordered unless it appears beyond doubt that the error complained of did not, or could not, have prejudiced the rights of a party litigant. Or to put it another way, this Court has consistently held that error is ground for reversal unless it *affirmatively* appears that it was not prejudicial.

In the case at bar, the Court of Appeals refused to follow the rules established by this Court in the above cases. Having had the above quoted opinions of this Court brought to its attention by oral argument and by briefs, the Court of Appeals clearly erred. No appellate judge could seriously say that the comments of the Trial Judge before the jury (recited on p. 7 of this petition), *could not have prejudiced* the rights of the defendant.

The Courts of Appeals in other Circuits have also held that a Trial Judge should not say anything that *might* prejudice the rights of a party before a jury.

In *Virginian Ry. Co.* v. *Armentrout* (C. A. 4), 166 F. 2d 400, 405, Judge Parker said that a trial judge "should be careful not to assume the role of counsel or to say anything which might have the effect of prejudicing the cause of either party before those whose duty it is to decide on the facts".

In *Gomila* v. *United States,* (C. A. 5), 146 F. 2d 372, 374, the Court held that,

> "The opinion of the judge, on account of his position and the respect and confidence reposed in him and in his learning and assumed impartiality, is likely to have great weight with the jury, and such fact of necessity requires impartial conduct on his part."

Was it impartial conduct for the Trial Judge in the case at bar to state in the presence of the jury that he didn't comprehend the defense and that the defendant's basic position was a desire not to pay, although he himself had formulated the issues and subsequently,

out of the presence of the jury, denied plaintiff's motions for a directed verdict and for dismissal of affirmative defenses?

The petitioner respectfully requests that this Court grant certiorari and answer this question in the negative.

III

The Court of Appeals erred in holding that a charge by the Trial Judge that any verdict for the plaintiff "will automatically be a verdict for $300,000." was correct, although evidence had been received that all the goods which petitioner had agreed to insure had not been, and could not have been, loaded aboard the vessel. This holding is directly opposed to the holdings of every English and American authority on the subject.

The defendant introduced evidence that all the goods defendant agreed to insure were not, and could not have been, on the barge. It was error, therefore, for the Trial Judge to charge the jury that any verdict for the plaintiff "will automatically be a verdict for $300,000." It was also error for the Court of Appeals to hold that once the question of materiality of the broker's representations prior to the issuance of the policy had been decided by the jury in favor of the plaintiff, the jury had to find for the plaintiff for the amount of the policy (App. 7). There is no connection between the materiality of a misrepresentation of the amount of cargo to be insured, and the question whether all the cargo defendant agreed to insure had been loaded on the barge.

The position on this question taken by the two lower courts, is opposed to every holding of every Court in England and the United States.

Nearly 150 years ago in *Forbes* v. *Aspinall*, 13 East 323, Lord Ellenborough considered the same erroneous theory adopted by the Trial Judge in the case at bar, stating at page 325:

> "But the plaintiffs contend, that as this was a valued policy, and as part of the goods to be carried upon the freight insured were on board at the time of the loss, they are entitled to claim their verdict for a total loss."

At page 326, Lord Ellenborough said:

> "The question then is, whether it makes any essential difference that this is the case of a valued policy? And we are of opinion, upon full consideration, that it does not."

At page 327, he stated the rule as follows:

> "The valuation, however, in the case of goods, looks to all the goods intended to be loaded; and in the case of freight, it looks to freight upon all the goods the ship is intended to carry upon the voyage insured: and if by the perils insured against in a valued policy on goods, part only of the goods intended to be covered be lost, the valuation must be opened, and the assured can only recover in respect of that part."

Lord Ellenborough, at page 327, demonstrating the folly of plaintiff's theory, assumed a situation where it was intended that 500 hogsheads of sugar should be shipped, but the ship takes on board only

100 hogsheads and is lost. In a rhetorical question the English Judge asked, "Can it be contended that the assured shall recover to the full amount of the valuation, that is for the whole 500, when he has lost only 100?"

In *Tobin* v. *Harford*, (1864) 17 C. B. (N. S.) 528, 536, Lord Blackburn dealt with the same question in the following words:

> "With regard to the real point to be decided, the fact that this is a valued policy is, in my mind, a mere accident, and does not affect the question. The question whether there is a total, or a partial loss, is in this case, as I think it ought in every case to be, quite independent of whether the policy was valued or not. The question is, what is the subject-matter that is covered by the insurance? And whether the whole of the subject-matter is lost, in which case it would be a total loss; or whether only a part of it is lost, in which case it would be a partial loss only, the amount of which would depend upon the proportion which the part that was lost bore to the whole subject-matter of the insurance."

Mr. Justice Washington in *Watson & Hudson* v. *The Insurance Co. of North America*, (1811) 29 Fed. Cas. 433, 434, stated the applicable law as follows:

> "The agreed value being intended, by both parties, to fix a just standard by which to ascertain the measure of the promised indemnity, it of course ceases to be obligatory, if, from any circumstances, it fails to furnish such standard. This happens in every instance where only a

> partial loss has happened, or where the property has been greatly overvalued. But it is not because of fraud in the overvaluation, that the policy is opened; for if it happen by accident, as by a part only of an expected cargo being put at risk, the insurer is not bound by the agreed value."

The leading American textbook authority, *Phillips On Insurance*, 5th Ed. Vol. 2, Sec. 1196, p. 10, states the correct rule of law in the following words:

> "A valuation of a cargo avails only pro rata where only a part of subject valued is at risk."

The Court of Appeals, in an opinion that failed to cite a single authority on any question, stated that, "There was no evidence that less than all of the goods covered by the insurance were shipped" (App. 6). That statement is erroneous, and easily demonstrated to be erroneous—from the trial record.

The broker, plaintiff's agent, testified that he knew—because the assured told him—that at the very time of the loading the shipment should weigh 300 tons (102a). Concededly, the goods shipped weighed no more than 120 tons (118a).

Defendant's expert, using plaintiff's own figures, testified that if the cargo represented to defendant had been on board it would have occupied 50,000 cubic feet and would have been piled 16 feet high on the barge (107a, 108a). Actually, the cargo on the barge was piled only 5 feet high (77a).

Plaintiff's surveyor testified that the longest measurement for any item on the barge was 5 feet (83a),

and that the Gray Marine Diesel Engines and the Hobart Arc Welders were "too big to be in that LCT and I never saw anything like that on board the LCT 732" (80a). He also testified that the D. & M. Economy Lathe was not on the barge (84a). Other witnesses testified that various items claimed by plaintiff to have been lost were so large that they could not have been aboard—since they were substantially larger than 5 feet (115a, 116a, 117a).

In addition, plaintiff's witness testified that the lost goods were "all brand new" (45a) and were "cleaned, painted and cosmolene and grease put on exposed parts" (49a). However, two of plaintiff's surveyors testified that the machinery loaded on the barge was "rusty" (85a; 89a) and not covered with grease (90a).

In short, the Court of Appeals was completely and clearly wrong when it stated that, "There was no evidence that less than all of the goods covered by the insurance were shipped" (App. 6).

Moreover, the Court of Appeals was clearly wrong even assuming—without conceding—the validity of its unsupported conclusion that the policy "was issued to cover the goods which Appel had in a warehouse in Manila" (App. 6). For, based upon the testimony of Server, plaintiff's witness, that the goods occupied a calculated area of the warehouse (59a), defendant proved by expert testimony, without refutation, that such a quantity of goods would have been piled 16 feet high on the barge (107a, 108a). The goods actually loaded aboard the barge were piled to a height of only 5 feet (77a).

There was, therefore, strong and abundant evidence that all the goods were not shipped. True, a jury might, or might not, have determined this issue in favor of the plaintiff—but the important point is that the jury was deprived of an opportunity to determine the issue because the Trial Judge, over objection (150a), charged them that any verdict for the plaintiff "will automatically be a verdict for $300,000" (146a).

CONCLUSION

By reason of the premises, a writ of certiorari should issue to review the decision of the Court of Appeals herein.

Dated: April 20, 1960.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 175—October Term, 1959.

(Argued February 3, 1960. Decided March 8, 1960.)

Docket No. 25848

NELSON H. LEO, doing business as OVERSEAS ASSOCIATED CORPORATION,

Plaintiff-Appellee,

—v.—

INSURANCE COMPANY OF NORTH AMERICA,

Defendant-Appellant.

Before:

MEDINA and WATERMAN, *Circuit Judges,* and MADDEN, *Judge,* United States Court of Claims.*

Action by insured on marine insurance policy. Insurer appeals from judgment of United States District Court for the Southern District of New York, Dawson, *J.,* entered upon jury verdict, awarding insured full value of policy. Affirmed.

* Sitting by designation.

DONOVAN, LEISURE, NEWTON & IRVINE (Robert M. Loeffler, Sidney P. Howell, Jr., Thomas J. Garrity, of counsel), New York City; In association with Honorio Poblador, Jr., Manila, Republic of the Philippines, *for Appellee.*

BIGHAM, ENGLAR, JONES & HOUSTON (Martin P. Detels, Vincent L. Leibell, Jr., Charles W. Harvey, of counsel), New York City, *for Appellant.*

MADDEN, *Judge:*

After a trial before a jury, a judgment for the plaintiff in the amount of $300,000 was rendered in the United States District Court for the Southern District of New York. The defendant appeals.

The plaintiff's complaint alleged that the defendant insurance company had issued to one Appel a marine insurance policy covering irrigation and road-building machinery valued at $300,000 to be shipped on an approved barge in tow sailing from Manila to Davao, Philippine Islands; that the goods were shipped, the barge sank and the goods were lost. The complaint alleged that Appel had assigned his interest in the policy to the plaintiff; that a claim had been duly filed with the insurance company and had been denied by it. The suit was for $300,000.

The defendant's answer admitted the issuance of the policy and the refusal to pay, and denied generally the other allegations of the complaint. The answer also set up three affirmative defenses, only one of which is relevant in the instant appeal. That defense was that Appel had misrepresented to the insurance

company that the cargo insured weighed at least 300 tons whereas in fact it weighed less than one-third that amount.

Appel's insurance broker, in Manila, in negotiating with the defendant insurance company for the placing of the insurance, wrote on August 12, 1953 to the defendant's local agent in Manila saying that the broker's client, Appel, was the co-owner of a large quantity of spare parts and equipment in Manila "of high value—I would venture to say $300,000." He said that Appel desired marine insurance for a contemplated transportation of the goods by water from Manila to Davao, and fire insurance before and after the water transportation. At the end of a fairly long letter of inquiry the plaintiff's broker wrote, "The approximate tonnage of this equipment is between 300 and 350 tons."

On August 14 the defendant's local agent wrote the plaintiff's broker asking for further information about the subject of the proposed insurance. This rather long letter contained the following sentence, "In any event, prior to the writing of this cover, we would require a more definite valuation." In answer to this letter the plaintiff's broker wrote:

> While the value of these shipments may seem high, we have checked and we find that on most spare parts for Diesel engines, the values run very high, and in this case, while an average of $1,000 per ton is estimated, we believe that to replace this equipment would cost almost three times as much. * * * Mr. Appel's actual book value of this equipment is $283,000 and we have pointed out that in view of reconditioning charges, packing, towing, etc., the $17,000 increase would definitely be in order.

After receipt of this letter the defendant's local agent in Manila wrote the defendant's home office in Philadelphia requesting the defendant to issue the policy here sued upon. This letter said that Appel was a valued client of Elser, Inc., the insurance broker in Manila which had negotiated the policy for Appel, and which company was, the letter indicates, a valued client of the defendant. The letter, and the policy issued pursuant to it, made no mention of tonnage.

So far as appears, all the goods co-owned by Appel and warehoused in Manila, i.e., the goods referred to in the correspondence leading up to the issuance of the policy, were loaded on the barge and were lost. They did not weigh 300 tons. They weighed about 120 tons. The defendant says that it would not have issued the policy had it not been for the misstatement in the letter of the plaintiff's agent that the goods weighed 300 tons.

The statement of the plaintiff's agent about the tonnage was greatly in error. The question for the jury was whether the statement was material, i.e., did it play any material part in inducing the defendant to issue the insurance? The jury must have concluded that it did not, since the jury was adequately instructed on the subject. The jury's conclusion was entirely reasonable. The book value which Appel represented to Elsen, Inc., the defendant's valued client, and which Elsen, Inc. reported to the defendant, would have been heavily relied on by an insurance company. That value was confirmed at the trial by the plaintiff's introduction of an inventory with specific values ascribed to each item, and by the deed of sale by which Appel had acquired the goods which showed that he had paid or obligated himself to pay

$326,480.38 for them two months before the policy in question was issued.

To be sure, the defendant produced at the trial two qualified expert witnesses, who, in response to a hypothetical question whether a representation that a shipment weighed between 300 and 350 tons with an average estimated value of $1,000 per ton was a circumstance that would materially affect the risk, each answered in the affirmative. It is worthy of note that the defendant's agent or agents who considered the issuing of the policy did not testify as to whether in fact the erroneous representation had induced them to issue it.

The defendant complains that the District Court did not give to the jury a specific instruction requested by the defendant to the effect that if the jury found that the misrepresentation of Appel's broker as to the tonnage of the shipment was material, the jury must find for the defendant. The court had, after reviewing the evidence relating to the misstatement of the tonnage, charged the jury:

> Also if you should find that the insurance company has established by a fair preponderance of the evidence that the insurance contract was issued as a result of fraud or misrepresentation of material facts, then, of course, you would have to decide for the defendant, because then the policy would be void.

We think the charge given by the court fairly presented the problem to the jury, and that it was well within the court's discretion to refuse to charge upon particular bits of evidence. The charge requested by the defendant was improper in that it did not

state that a misrepresentation, though material, must be found to have been in fact an inducing cause of the making of the contract in order for it to be a ground for nullifying the contract.

It should also be said that there was probably not enough evidence of materiality to justify submitting the question to the jury. The expert testimony referred to earlier herein seems to us to have been of no weight. The hypothetical question did not describe the kind of goods to which it related. As to many kinds of goods having an ascertainable market value per ton, a misstatement of the tonnage would be a misstatement of value, which would be material. As to many other kinds of goods, including the goods here involved, an insurance company might not relate tonnage to value at all. As we have said, there was no evidence at all that the defendant had, in fact, relied on the representation of tonnage in deciding to issue the policy.

The defendant complains of the court's instruction that if the jury should return a verdict for the plaintiff, it should be for $300,000. The defendant says that the court should have permitted the jury to bring in a verdict for a lesser sum.

The court's charge was correct. The policy was a valued policy for $300,000. It was issued to cover the goods which Appel had in a warehouse in Manila. There was no evidence that less than all of the goods covered by the insurance were shipped. The tonnage of the goods was misstated, and that posed the question of materiality which we have discussed above. Once the jury had resolved that question, if there was a question to be resolved, it had to either find for the defendant on the ground of material misrepresenta-

tion, or find for the plaintiff for the amount of the policy. To have authorized the jury to find for the plaintiff, but for a lesser amount, would have been to authorize them to bring in a compromise verdict not justified by the evidence.

The defendant complains of the court's refusal to give a specific charge that if the jury found that the crates and cases contained scrap or rusty metal equipment, then they must find for the defendant because then the agreed valuation would have been arrived at by both a misrepresentation and a concealment of a material fact.

The court's refusal to charge the jury on particular bits of evidence was applicable to this request, and was proper. The court's charge that if the policy was issued as a result of fraud or material misrepresentation it was void, was sufficient.

During the trial of the case, the Judge said, in the presence of the jury, that he did not yet understand what the defendant's defense was, and asked counsel if it was only that they did not want to pay the money. That the Judge had been unable to get a clear understanding of the issues was natural, since so many defenses were suggested or hinted at but no substantial evidence was offered to support them. It was high time that the issues be defined for the Judge and the jury, and it was proper for the Judge to insist that they be defined. His casual, and obviously humorous, remark about not wanting to pay the money might better have been left unsaid, but we have no idea that it made an impression on the jury which affected the outcome of the case.

We find no merit in the appeal and the judgment is therefore affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

NELSON H. LEO, doing business as Overseas ASSOCIATED CORPORATION,

Plaintiff-Appellee,

v

INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania Corporation,

Defendant-Appellant.

175

JUDGMENT

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

FILED MARCH 8, 1960

A. DANIEL FUSARO, CLERK

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of March, one thousand nine hundred and sixty.

Present: HON. J. WARREN MADDEN,
Judge, U. S. Court of Claims,

HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges.

NELSON H. LEE, doing business as Overseas Associated Corporation,
Plaintiff-Appellee,

v

INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania Corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO
Clerk

FILE COPY

Office-Supreme Court, U.S.
FILED
MAY 19 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 874

NELSON H. LEO, doing business as OVERSEAS ASSOCIATED CORPORATION,

Respondent,

against

INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania Corporation,

Petitioner.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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NELSON H. LEO, doing business as
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against

INSURANCE COMPANY OF NORTH AMERICA,
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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinion Below

Respondent brought this action in the District Court for the Southern District of New York on January 18, 1955 upon a valued policy of marine insurance. Following a nine day trial a jury verdict in plaintiff's favor was rendered for the face amount of the policy, $300,000. On appeal, the Court of Appeals for the Second Circuit unanimously affirmed. Its decision was handed down on March 8, 1960 and is reported at 275 F. 2d 766.

Questions Presented

1. Whether certain remarks of the Trial Judge complained of by defendant-petitioner, when taken in context, precluded defendant from having had a fair and impartial trial.

2. Whether there was evidence of a *bona fide* partial loss which would require submission of such an issue to the jury.

Statement of the Case

The issues sought to be raised before this Court by the petition were disposed of by the court below after reviewing an extensive record. It is believed that a more complete statement than that contained in the petition of the facts, the conduct of the trial, and the issues disposed of by the findings of the jury and reviewed by the courts below, will be itself sufficient to disclose the absence of any merit in the questions sought to be raised by the petition.

The Facts.

In July, 1953 one I. H. Appel purchased from plaintiff Nelson H. Leo several lots of machinery and spare parts (listed on the inventory thereof (Exh. 3, 502A-561A))* located in a warehouse outside of Manila for a price of $326,480.38. The price had been arrived at by a physical inventory of the goods catalogued item by item at prevailing wholesale prices (10A, 13A; 68A-75A, 80-1A voir dire 81-9A; 94A, 97A, 110-1A; 167-8A). Appel had purchased the goods for the purpose of establishing a machine shop and parts depot in Davao on the southern island of Mindanao (6A-7A, 75A).

In August, 1953, Louis P. Nuber of E. E. Elser & Company, insurance brokers in Manila, acting in behalf of Appel, applied to defendant's Manila agent, Karl Reed, for quotation of a rate for a $300,000 valued policy covering the shipment of the goods from Manila to Davao (Exh. W, 619A; 17-18A; 132-3A). After an exchange of correspondence Reed quoted a premium and requested his home

* Figures followed by "a" refer to pages of appellant's appendix, Volume I of certified record. Figures followed by "A" refer to pages of appellee's appendix, Volume II of certified record. Figures preceded by "App." refer to appendix to the petition.

office to issue the policy (Exh. 47 615A). In his correspondence with Reed, Nuber volunteered that the approximate tonnage of the shipment was "between 300 and 350 tons" (Exh. W, 619A). Reed, however, had made no inquiry with respect to the weight, and made no reference to it in his correspondence with the home office of defendant requesting the issuance of the policy. The defendant was at all times advised that the shipment would be in a single voyage aboard a converted LCT (Exhs. X and Y, 620A and 622A; Exh. 46, 614A), which, as a matter of readily available information, has a cargo capacity of only about 150 tons (121A; 153A). In September Appel received from defendant's Philadelphia office the policy in suit which assured Mr. I. H. Appel for an interest in irrigation and road-building machinery, equipment and spare parts, valued at $300,000, on a single voyage by an approved barge in tow from Manila to Davao, P. I. (Exhs. 6 and 8; 567A and 569A; 17-9A).

In the late summer and fall of 1953 the goods were rechecked, cleaned and repacked for shipment to Davao (16A; 77A-81A, 89A-90A). During this procedure a packing list (Exh. 22, 580A-612A) was prepared which reflected the approximate weight in kilograms of the entire shipment (78A-80A, 91-2A). A comparison of the inventory (Exh. 3, 502A-561A) with the packing list shows that all items on the inventory were placed into 636 numbered crates which, in all, were estimated to weight 108,117 kilos or about 117 short tons. The weight estimate on the packing list was confirmed by plaintiff's expert appraiser (146-50A) who independently investigated the weights of the items listed on the inventory by direct recourse to manufacturers' weight specifications; the weight estimate also corresponds to the calculations of the weight of the cargo on board the LCT 732 (152A-153A).

In November and December, 1953 the LCT 732 was reconditioned under the direction of marine surveyors (Exh. 27) and the Philippine Bureau of Customs (Exh. 28 and 37; 35A-40A; 48-9A) and approved by both for the voyage

(Exh. 15, 571A; Exh. 29). In the latter part of December, 1953 the barge was loaded and a loading survey was issued by the marine surveyors which attested to the proper loading and stowage of all 636 cases and crates of machinery and machinery parts (Exh. 17, 574A; 16A, 20-2A; 28A-33A, 41-2A, 49A; 115-9A; 119-123A; 70-1a; 87a).

In the early morning of December 30, 1953 the tug with the LCT 732 in tow cleared Manila. That night the wind kicked up and the barge was subjected to considerable strain. On the following morning the barge developed a list, and while being towed toward the coast by the tug in the hope of beaching the barge, it capsized and sank in 48 fathoms. No part of the cargo was ever recovered (Tr. 161-179, 294-305, 375-392).

Appel still owed Leo, the plaintiff, $300,000 on the purchase price of the goods, which was represented by a promissory note given in part payment of the goods (Exh. 5, 566A). The matter was resolved by Appel assigning to Leo his interest in the policy in cancellation of the note (Exhs. 20 and H, 577A; 61-3A; 92-93A).

Conduct of the Trial.

At the trial defendant's fundamental and constant defense was that the loss was not one occasioned by perils of the sea covered under the policy because the whole transaction from its inception was a scheme to defraud the insurance company. This defense—never raised in the pleadings—was asserted in defendant's opening statement ("We don't hesitate to say that this transaction was infested with fraud") without, however, any specification then or later of the manner in which it contended fraud was committed or any specification of the conduct which it contended constituted fraud. This contention of fraud was also asserted by defense counsel, in the jury's presence, during colloquies with the Court in connection with the relevance of evidence. It was the primary grounds of defense argued to the jury in defendant's summation.

Defendant rested its case without introducing any explicit testimony of fraud or adopting any single version of the facts. At no time did the defendant specify the respects in which it contended the transaction was fraudulent, and the Court was consequently impelled to inquire from time to time as to the theory of the defense in order to determine the particular lines of inquiry and in order to frame the issues for the jury. Late in the seventh day of the trial, after the defense had closed, the Court was led to inquire:

> "In short, you are talking in general terms of fraud, but what kind of fraud, and of what particular relevance to the issues in the case?" (162A)

Earlier the same day during cross-examination of plaintiff's expert, the Court had been obliged to rebuke defense counsel for continuing to follow a scattershot defense:

> "Mr. Leibell, if you only would get someplace where you would really have something that you are saying as a defense to this claim, I think it would be appreciated.
>
> . . . . . .
>
> "You are wandering all over the lot. One moment you send a diver down and you can't even find it. Another moment you are talking about whether the ship was properly repaired, which makes no difference as to the insurance policy." (154A)

The Trial Judge then explained that his purpose was to determine which issues of fact defendant was contesting:

> "Those comments are made by me to try to speed this case up and point up the issues in this case." (154A)

When later, the Trial Judge asked the relevancy of defense questions concerning whether or not, during the gale, the captain of the tug should have shortened the towline, defense counsel—in the presence of the jury—stated he had "treated this whole thing right from the time of my

opening statement as a phony fraudulent transaction" (156A).

It is in this context and background that the particular comments complained of by the defendant as warranting the attention of this Court, must be viewed. On rebuttal when plaintiff offered evidence, relating to certain telephone numbers on a document, to preclude a summation argument by defendant on a point which had become apparent to plaintiff's counsel although never disclosed to the Court by defendant, the following colloquy took place:

> "Mr. Leibell: I object to it as being new material.
>
> The Court: What difference does it make?
>
> Mr. Howell: Your Honor, not ten minutes ago Mr. Leibell stood here and said that this was a fraudulent case. When he introduced this document in evidence after Mr. Appel left the stand for the first time I understood what the real defense in this case was.
>
> The Court: If you understand it you are ahead of me." (160A)

It is clear that the Trial Judge, understandably puzzled, was simply attempting to determine the defense theory. He made a special effort to insure that the jury would not infer that he was in any way disparaging the defense by immediately continuing:

> "My comment was a comment on my own ignorance of your defense, not as a characterization of it. But I have been unable to get in mind what you are driving at." (160A)

Defense counsel moved for a mistrial shortly thereafter. In denying it the Court pointed out:

> "Mr. Leibell, when I try to find out what a defense is so that the court and the jury can find out about it, I am usually regarded as doing something helpful to the defense, because I am trying to find out what their defense is so that we can be guided accordingly.

"Now, you seem to take offense in my trying to find out what your defense is. Your motion is denied.

Mr. Leibell: May I have one moment to tell your Honor the nature of our defense?

The Court: You have had two weeks to explain your defense and I am still puzzled as to exactly what your defense is, Mr. Leibell." (161-2A)

The Court continued in its attempt to obtain a statement of the defense's theory of the facts, during which this exchange took place:

"Mr. Leibell: The basic position we have——

The Court: Is that you do not want to pay the money. That is your basic position here, isn't it?" (163A)

At the Court's invitation after the interjection of the above remark, which was obviously intended humorously, defense counsel resumed his summation of his version of the issues, in the jury's presence, after which the Court commented:

"The Court: All right, you go ahead. Mr. Leibell has helped to get some of the things into focus anyway." (165A)

As well as during the trial, the Court, in its charge to the jury, made abundantly clear the absence of any intent to influence its verdict, first by delineating the respective functions of Court and jury:

"Just as I am the exclusive judge of the law, so you, the members of the jury, are the exclusive judges of the facts. As the sole and exclusive judges of the facts, you and you alone determine the weight, the effect, the value of the evidence and the credibility of the witnesses; and on that basis you will decide the issues of fact which I will submit to you." (188A)

And then by carefully instructing the jury to disregard any colloquies:

"I have sought to avoid any comments which might suggest my personal views on the evidence.

> You are not to assume that I have any views, other than I have indicated in these instructions to you.
>
> . . .
>
> The actions of the Court during the trial in ruling upon motions, or in overruling objections, or in sustaining objections, or in statements to counsel, or in attempting to set forth the law in these instructions, are not to be taken by you as any indication of any determination of the issues of fact by me. These matters upon which I have ruled are matters of procedure and law with which the jury has no concern. You are the judges of the facts." (199A)

The same comments of the Trial Judge which are urged by petitioner as a reason for the issuance of a writ of certiorari were also urged by it before the Court of Appeals as a ground for reversal. After a full review of the record before it, the Court of Appeals quite properly observed:

> "That the Judge had been unable to get a clear understanding of the issues was natural, since so many defenses were suggested or hinted at but no substantial evidence was offered to support them. It was high time that the issues be defined for the Judge and the jury, and it was proper for the Judge to insist that they be defined." (App. 7)

The Court of Appeals accordingly quite properly ruled that the comments could not have "made an impression on the jury which affected the outcome of the case" (App. 7). Upon the record as a whole, there can be no doubt that defendant had a fair and impartial trial.

The Court's Charge with Respect to Total Loss.

In its petition the defendant complains of the Trial Judge's charge that if the jury found for the plaintiff, the recovery should be for the face value of the policy. The defendant objects to the failure of the Trial Judge to authorize a partial recovery for the plaintiff upon a theory of a partial loss, i.e., a total loss of a shipment of only part of the goods insured.

The Trial Judge at no time held, as petitioner implies, that plaintiff could recover the full amount of the policy if a part of the goods insured were not shipped. No rulings were predicated upon such a theory. On the contrary, the jury was instructed to find for the plaintiff only if they found "that the goods were loaded on the barge for the voyage which was insured" (191A); "that the goods were shipped on the barge" (191A); "that the goods were in existence, were loaded on the barge, . . ." (192A); and "that the cargo shipped on the barge was the cargo insured" (196A). Furthermore he specifically charged that "It (the defendant) contends that the goods, or a substantial part of them, were not actually shipped on the barge" (192A), and then instructed the jury to decide for the defendant if they found "that the goods were not shipped on the barge" (196A, 197A).

The fact of the matter is that the particular items of evidence referred to by defendant in its petition (pp. 19-20), as supposed support for a finding that a substantial part of the goods insured had not been shipped, were necessarily submitted to the jury under the foregoing instructions and additional instructions with respect to the defendant's claim of fraud under charges (188A-201A) requiring a verdict for the defendant if the evidence of substantial omission from the shipment of part of the goods insured could be believed. The jury has already passed upon the defendant's contention and rejected it. It is unnecessary here to discuss defendant's characterization of the items in its petition, or their weight or credibility; the same distilled items were urged by defendant before the Court of Appeals, were treated at length by plaintiff in its brief before the Court of Appeals (pp. 29-35), and after a full review of all of the evidence bearing upon the issue the Court of Appeals aptly appraised defendant's contention as follows: "There was no evidence that less than all of the goods covered by the insurance were shipped" (App. 6). What petitioner now asks this Court to do is to review the entire record of a nine day trial to determine whether there was

sufficient evidence on a particular question of fact to warrant its submission to the jury under special instructions, after both the Trial Court and the Court of Appeals have already decided the question in the negative.

Reasons for Denying the Writ

The petition raises no issues of a nature or of sufficient importance to warrant the attention of this Court. The decision of the Court of Appeals adequately and completely disposes of the contentions which petitioner would raise before this Court, and no substantial question exists as to the correctness of the decision of the Court below.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In association with:
HONORIO POBLADOR, JR.,
of Manila, Republic of the Philippines.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 874

NELSON H. LEO, doing business as OVERSEAS ASSOCIATED CORPORATION,

Respondent,

—against—

INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania Corporation,

Petitioner.

REPLY BRIEF FOR PETITIONER

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Petitioner.

REPLY BRIEF FOR PETITIONER

The petition herein raises only questions of law. The manner in which the ruling of the Court of Appeals in the instant case conflicts with prior holdings of this Court, other Courts of Appeals, and English Courts is supported by numerous references to, and quotations from, applicable opinions.

The respondent in its brief in opposition to the petition has cited not a single authority on any subject; nor has it questioned the validity of any authority relied upon by the petitioner. It has simply submitted an inflated and unnecessary narrative in the hope of convincing this Court that there are no questions of law involved in this petition.

The Trial Judge's comment in the presence of the jury that the defendant's basic position was that it did not want to pay the money deprived petitioner of the fair, impartial trial by jury guaranteed to all litigants, large or small, corporate or individual.

The respondent in its brief in opposition to the petition tries to excuse the statement of the Trial Judge in the presence of the jury, that defendant's basic position was that it did not want to pay the money, by alleging that the remark "was obviously intended humorously" (Resp. brief, p. 7).

The petitioner specifically called upon the respondent to indicate for this Court any single reference in the trial record that would justify a conclusion that the Trial Judge's remark was "casual" or "obviously humorous" (Petition, p. 9). The respondent has not referred to any part of the trial record to justify any such conclusion. He has not done so, because there is nothing in the trial record to indicate any humor. On the contrary, the following immediate reaction of the defense counsel to the Trial Judge's unfair comment demonstrates the exact opposite:

> "I have to again object to these remarks, much as I regret that I have to do it, your Honor" (125a).*

Respondent, unable to defend the Trial Judge's remark, argues that the Trial Judge cleared the

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* Figures followed by "a" refer to pages of appellant's appendix, Volume I of certified record.
Figures preceded by "App." refers to appendix to the petition.

record of any error by informing the jury in the charge that they were the exclusive judges of the facts (Resp. brief, p. 7).

Both this Court and the Court of Appeals for the Second Circuit have held that such comments in the charge to the jury lack a purgative effect. Thus, in *Quercia* v. *United States,* 289 U. S. 466, 472, Mr. Chief Justice Hughes said:

> "Nor do we think that the error was cured by the statement of the trial judge that his opinion of the evidence was not binding on the jury and that if they did not agree with it they should find the defendant not guilty."

The Court of Appeals for the Second Circuit in *United States* v. *Brandt,* 196 F. 2d 653, 656, held that:

> "The government insists on the curative effect of the charge, in which the jury was admonished that its own view of the evidence controlled, citing the similar case of United States v. Aaron, 2 Cir., 190 F. 2d 144, certiorari denied Freidus v. United States, 342 U. S. 827. Such admonitions may offset brief or minor departures from strict judicial impartiality, but cannot be considered sufficient here".

The Court of Appeals for the First Circuit in *Crowe* v. *DiManno,* 225 F. 2d 652, 655, a civil case, followed the ruling in the *Quercia* and *Brandt* cases with this apt comment:

> "The cases cited above are both criminal. We have no doubt, however, that the principles enunciated in them apply as well to civil cases."

Petitioner does not doubt, either, that the basic principles of simple fairness in the conduct of jury trials apply to civil as well as criminal cases.

2.

The Court of Appeals held that it had "no idea that it (the Trial Judge's comment) made an impression on the jury which affected the outcome of the case" (App. 7). Accordingly, its failure to grant the petitioner a new trial was error.

The respondent in its brief in opposition to this petition does not challenge the position taken by petitioner and supported by the authorities, that a new trial should be granted unless it appears affirmatively and beyond doubt that the remark complained of did not, and could not have prejudiced the rights of a party litigant.

However, respondent has attempted to avoid the effect of this well-founded legal principle by reading into the opinion of the Court of Appeals something that is not there. Thus, respondent states:

> "The Court of Appeals accordingly quite properly ruled that the comments could not have 'made an impression on the jury which affected the outcome of the case' (App. 7)". (Resp. brief, p. 8)

Actually the Court of Appeals had said:

> "His casual, and obviously humorous, remark about not wanting to pay the money might better

> have been left unsaid, but we have no idea that it made an impression on the jury which affected the outcome of the case" (App. 7).

Consequently, the words "could not have" are respondent's words, making the conclusion reached respondent's conclusion and not the conclusion of the Court of Appeals.

Indeed, the Court of Appeals could not have had any "idea" as to the effects of the Trial Judge's unfair remark in the presence of the jury, because there is absolutely nothing in the trial record that would lead anyone to the conclusion that the remark *could not have* made an impression on the jury which affected the outcome of the case. The Court of Appeals was frank to state that it had no "idea" as to the effect of the remark. This being so, a new trial should have been granted. *McCandless* v. *United States,* 298 U. S. 342, 347; *Vicksburg & Meridian R. R.* v. *O'Brien,* 119 U. S. 99, 103.

3.

Petitioner claims that it was erroneous and contrary to English and American authorities, for the Trial Judge to charge the jury that any verdict for the plaintiff "will automatically be a verdict for $300,000".

Respondent in its brief appears to deny the fact that the Trial Judge instructed the jury that any verdict for the plaintiff "will automatically be a verdict for $300,000". Nowhere in respondent's brief is there any mention of the very language in the charge complained of by the petitioner. On the contrary, re-

spondent argues, "The Trial Judge at no time held, as petitioner implies, that plaintiff could recover the full amount of the policy if a part of the goods insured were not shipped" (Resp. brief, p. 9).

So that there may be no doubt about the fact that the Trial Judge charged the jury on the point just as petitioner claims, we quote here the entire pertinent paragraph from the Trial Judge's charge to the jury:

> "The jury will, therefore, retire and reach its verdict. It will be a verdict either for the plaintiff or for the defendant. If it is a verdict for the plaintiff, it will automatically be a verdict for $300,000 and interest, and the judge will compute the amount of interest" (146a).

In view of that clear-cut statement of the Trial Judge that any verdict for the plaintiff must be for $300,000 (the amount sued for) it is inconceivable how respondent can tell this Court that "The Trial Judge at no time held, as petitioner implies, that plaintiff could recover the full amount of the policy if a part of the goods insured were not shipped" (Resp. brief, p. 9).

By his instruction to the jury that any verdict for the plaintiff must "automatically be a verdict for $300,000" the Trial Judge foreclosed the jury from determining as a fact whether all of the insured goods had been put at risk. No other conclusion is possible, for if the jury had been permitted to find that less than all the insured goods had been loaded on the LCT, and thus placed at risk, the jury verdict of necessity would have had to be for less than $300,000.

CONCLUSION

By reason of the premises, a writ of certiorari should issue to review the decision of the Court of Appeals herein.

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Respectfully submitted,

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